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IN THE

Supreme Court of the United States

October Term, 1962

No. 776

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,

Petitioner,

—v.—

EASTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court below (Pet. A, p. 1a) is reported at 307 F. 2d 510. The opinion of the District Court (Pet. App. 2a-21a) is reported at 208 F. Supp. 182.

Jurisdiction

The judgment of the Court below was entered on August 30, 1962. By an order dated November 23, 1962, the time for filing a petition for a writ of certiorari was extended to and including January 26, 1963. The petition was filed on January 26, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

Question Presented

The Courts below found that the parties had negotiated with each other concerning the problem of crew complement on aircraft since February, 1961, after petitioner had conducted a strike over this issue; that the problem was also handled in mediation and by a Presidential Commission and a Presidential Emergency Board; that petitioner rejected arbitration and called a second strike beginning June 23, 1962, with crew complement as the crucial issue; and that respondent, after its airplanes had been idled for almost a month by the later strike, commenced operations under crew complement arrangements to which the striking petitioner had not agreed but as to which the procedures of negotiation, mediation and Emergency Board under the Railway Labor Act, had been exhausted. The dispositive question presented is whether, in these circumstances, the two Courts erred in finding that the procedures of the Railway Labor Act had been exhausted and that respondent's crew complement changes, like petitioner's second strike, were therefore permissible.

Additional Statement of the Case

"Judge Feinberg's thorough and well reasoned opinion"—as it was characterized by the Court below, which adopted its reasoning in the *per curiam* affirmance (Pet. App. 1a)—states in careful detail the facts of the case, in which he found no warrant for the preliminary injunction petitioner sought (Pet. App. 2a-9a). Respectfully referring to that account as ample basis for appraising the petition, we merely note here some of the central facts omitted from petitioner's incomplete and undocumented Statement.[1]

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[1] As the District Court observed (Pet. App. 2a, fn. 1), petitioner submitted only the verified complaint on its application

While it is based upon the claim that the issue of crew complement has never been processed under the Railway Labor Act since the Section 6 notices of February 1960, and that "self-help" on this issue has therefore remained forbidden, the petition omits the fact that petitioner struck respondent on this issue on February 17, 1961 (Pet. App. 4a). Likewise omitted by the fourteen-month gap the petition leaves between July 1960 and September 5, 1961 (see Pet. 5, first paragraph), is the fact that a Presidential (Feinsinger) Commission was created to end the February 1961 strike and "to make recommendations with respect to a settlement of the parties' dispute over the crew complement problem" (Pet. App. 4a). The Commission first reported on May 24, 1961, and again on October 17, 1961, and negotiations, mediation and Emergency Board proceedings between the parties from that time on concerned the issue of crew complement as well as other issues (Pet. App. 4a-5a).

After the statutory and extra-statutory efforts of the National Mediation Board and the Feinsinger Commission failed to produce a settlement, petitioner served a strike notice on February 21, 1962. The President appointed an Emergency Board which, in this final stage of the Railway Labor Act's procedures (Sec. 10, Pet. App. 23a), considered the "critical" issue of crew complement and recommended implementation of the Feinsinger Commission's recommendations (Pet. App. 5a). Further negotiations and mediation sessions were unsuccessful; petitioner rejected arbitration, even when it was proposed by the President; it served another strike notice; and the strike commenced on June 23, 1962 (Pet. App. 5a-6a).

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for a preliminary injunction. Thus, the findings below rest largely upon the detailed and uncontroverted affidavit in opposition (*Ibid.*).

Thus, in the words of the District Court, crew complement and related issues were "the crucial elements of the dispute which divided the parties during the extensive bargaining since February 1961, when the Flight Engineers actually went out on strike because of these issues" (Pet. App. 13a). In addition, "it is clear that the primary cause of this labor dispute and the current strike was the crew complement problem and its related issues" (*Ibid.*). And "these issues have been a subject of negotiation since February 1961, and as to them, the processes of the Act have been exhausted" (*Ibid.*).

After the second strike on this "primary cause" had been in progress for a month—causing the substantial injuries to respondent, its employees and the public mentioned in the District Court's opinion (Pet. App. 8a-9a)—respondent resumed limited operations, inaugurating crew complement changes to which the striking petitioner had not agreed, but which had been offered to petitioner and subjected to all of the procedures of the Railway Labor Act.[2]

Reasons for Denying the Writ

All three of the questions petitioner proposes (Pet. 2) rest upon the false premise that the courts below held it unnecessary to exhaust the procedures of the Railway Labor Act before resorting to "self-help" in the form of either

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[2] Even more strikingly than the petition, the proposed brief *amicus* of the Railway Labor Executives' Association, to which respondent has not consented, handles the material facts of this case by wholly ignoring them. It pretends (p. 6) that the decision below stands for the absurd proposition that a representative waives a Section 6 notice if it "so much as talks to a carrier about changes. . . ." Building upon such patent misrepresentations of the decisions of the Courts below, this *amicus* presentation could serve no useful purpose.

a strike or unilateral changes in working conditions. It is clear, however (see, e.g., Pet. App. 11a, 13a-14a), that the decision below fully recognizes this exhaustion requirement and finds it satisfied in the circumstances of this case. This conclusion, essentially factual in nature and hinged to the particular details of this controversy, is decisively supported by the record. If its correctness were more doubtful, however, it would present no problem of general importance. And there is nothing approaching a conflict of decisions. In short, we submit, there is no occasion for further review of this denial of a preliminary injunction, which petitioner sought on the bare generalities of a verified complaint.

1. On the facts sketched above and more fully reviewed by the District Court (Pet. App. 2a-9a), it is clear that few major disputes under the Railway Labor Act have been more thoroughly subjected to the statutory procedures than this one. Not one, but two Presidential bodies have considered the crew complement issue. It had been negotiated for a year and a half and handled to unsuccessful termination by the National Mediation Board; and it had led to two strikes by petitioner, the second of which had already lasted almost a month before respondent undertook to operate its airline with the crew complement changes of which petitioner complains.

In such circumstances, it seems bizarre to contend, as petitioner does, that the statutory procedures have not yet even begun with respect to crew complement because the general notices served under Section 6 back in February 1960 were not sufficiently specific. As the District Court observed in passing (Pet. App. 14a), even this hypertechnicality "may have" been erased by petitioner itself when it made more detailed proposals on April 1, 1960.

referring to questions of crew complement.[2] But there is no need to labor this alternative ground. The sufficient fact is that *both* parties have proceeded with a clear recognition that the statutory procedures have been exhausted with respect to crew complement—petitioner by striking on this "crucial" issue (Pet. App. 13a) and respondent by taking the unilateral measures now questioned.

Indeed, the only extraordinary thing about this case is petitioner's bland charge of unlawful self-help after its second strike on the question had already lasted almost a month. As the District Court noted (Pet. App. 11a), it is elementary that the prohibition against premature unilateral action cuts both ways. Petitioner's thesis is that the Railway Labor Act forbids respondent even to try to operate without the strikers. The Courts below were on solid ground in refusing to hold that the Act "stacks the deck" (Pet. App. 13a) in any such incredible fashion.

2. Petitioner finds a second certiorari question (Pet. 2, 12-17) in a paragraph of the District Court's opinion (Pet. App. 14a-15a) saying "it can be argued that" petitioner waived any supposed "technical deficiency" by proceeding to negotiate and mediate the matter of crew complement. While this suggestion of an alternative ground seems wholly correct, it could hardly suffice as an independent basis for review by this Court. Moreover, the skimpy record on which petitioner has chosen to proceed would be unsuitable

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[2] Gratuitously and mistakenly charging "misrepresentation of the facts by Eastern on oral argument" (Pet. 4, fn. 3), petitioner says the District Court was wrong in this respect and proceeds to offer characteristically undocumented explanations about matters of non-record fact. It is plain, however, that the District Court was suggesting a sound inference from the documents before it. And this is obviously not the occasion for responding to the kind of factual addenda petitioner offers.

for further exploration of such a largely factual issue, even if this issue were more essential than it is to the decision below.[4]

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[4] Petitioner attempts to give credence to its argument on "waiver" by pretending (Pet. 12-13) that bargaining over crew complement issues occurred only "at the behest of the carrier", and that (Pet. 2) such issues were "unilaterally injected by the carrier over the protest of the Union". Thus petitioner seeks to create the impression (Pet. 14-16) that it was not on notice that the crew complement question was a major issue in negotiations, that petitioner "concentrated on the 'economic' issues" while respondent "concentrated its efforts upon the 'crew complement' issues" and that petitioner never realized that the crew complement issues might become a subject for self-help after an impasse was reached in negotiations. The fiction of petitioner's contentions is revealed by the District Court's findings (based on uncontroverted evidentiary materials) that *petitioner* injected the crew complement issues into the negotiations by its strike of February 1961 (Pet. App. 3a-4a); that the Feinsinger Commission was established at that time "to make recommendations with respect to a settlement of the parties' dispute over the crew complement problem" (Pet. App. 4a); that both petitioner and respondent "participated in the hearings before the Feinsinger Commission" (*Ibid.*); that after the Feinsinger Commission made its final recommendations in October 1961 "negotiations between Eastern and the Flight Engineers were concerned not only with the issues originally raised by the 'section 6' notices but also with the crew complement issue," negotiations concerning such matters being "carried on both under the auspices of the National Mediation Board at that agency's request, and also with the assistance of Professor Feinsinger and Undersecretary of Labor Willard Wirtz" (Pet. App. 4a-5a); that the Emergency Board in 1962 received evidence and heard testimony concerning the crew complement issue and found it to be a "critical part of this dispute" (Pet. App. 5a); that in further negotiations on the subject petitioner told respondent "that any new agreement had to provide that all men hired by Eastern in the future must have the A&P license" (Pet. App. 6a); that petitioner specifically recognized the importance of the crew complement issue by expressly excluding it from a proposal to submit other issues to arbitration (*Ibid.*); that immediately after the strike started petitioner rejected an offer to settle on the same basis as a settlement at Trans World Airlines because petitioner "would never give up the requirement of an A&P license" (Pet. App. 7a); that "the primary cause of this labor dispute and the current strike was the crew complement

3. Similarly, there is no need to reach petitioner's third question (Pet. 2), which, again, rests upon the assumption that respondent "has not complied with the procedures . . . of the Act" prerequisite to changes in working conditions. The fallacy in this assumption, already noted, also explains petitioner's rather prolific citation of assertedly conflicting decisions (Pet. 9, 11, 17). All of the cited cases, on totally different facts, stand for the proposition—here undisputed—that a carrier may not ignore the procedures of the Railway Labor Act in making or threatening changes in collective agreements. There is still less merit in petitioner's claim (Pet. 18-19) that the Court below in this case created a "conflict" with its own decision a month earlier in *Pan American World Airways, Inc.* v. *Flight Engineers' International Assn., PAA Chapter*, 306 F. 2d 840 (2d Cir. 1962). That decision, vindicating the right of petitioner's sister local to strike despite a carrier's claim that there had been no Section 6 notice concerning crew complement, is wholly harmonious with, and serves to support, this one (see Pet. App. 11a-13a).

'problem and its related issues" (Pet. App. 13a); and that on July 24, 1962, petitioner itself recognized the crew complement issue as being crucial by proposing that the strike be settled on the basis of an agreement "regarding the crew complement issues within the framework of the already agreed-upon basic issues" (Pet. App. 8a). These high lights of the year and a half in which the crew complement issue was thoroughly negotiated, discussed and mediated reveal the absurdity of petitioner's claim that it was not on notice that the issue existed and that both parties could not resort to self-help after impasse. Add to this undisputed history the fact that petitioner does not even now challenge the District Court's finding that the crew complement issue was the real cause for the strike on June 23, 1962 and it becomes still clearer that the District Court correctly held that petitioner had waived any possible objections to "notice" concerning the crew complement issue.

CONCLUSION

The decision below is correct and there is neither a conflict of decisions nor any other reason for further review of petitioner's motion for a preliminary injunction. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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